

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

STANLEY J. WESLOWSKI,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBERS
PH-0351-98-0070-I-1
PH-1221-97-0377-W-1

DATE: JAN 28 1999

Stanley J. Weslowski, Moscow, Pennsylvania, pro se.

Karen Tomaine, Esquire, Tobyhanna, Pennsylvania, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decisions, issued on October 31, 1997, and February 27, 1998, that, respectively, dismissed his whistleblower appeal based on the terms of a settlement agreement entered into by the parties, and dismissed his appeal of the merits of his separation by operation of reduction-in-force (RIF) procedures as untimely filed. For the reasons set forth below, we DENY the petition in MSPB Docket No. PH-1221-97-0377-W-1, GRANT the petition in MSPB Docket No. PH-0351-98-0070-I-1, and AFFIRM that initial decision AS MODIFIED, dismissing the appeal for lack of Board jurisdiction.

BACKGROUND

¶2 In 1996, the agency reorganized to realign, restructure, and streamline its positions. *See* Initial Appeal File, MSPB Docket No. PH-1221-97-0377-W-1 (IAF), Tab 4, Subtab 4f. On July 24, 1996, the agency informed the appellant, a WL-5 Equipment Cleaner Leader, that he had been affected by its reorganization. This resulted in the application of RIF procedures. *See* IAF, Tab 4, Subtab 4b. The agency informed the appellant that he was identified for release from his competitive level, and offered him the position of Sandblaster, WG-7. *Id.* The agency asked the appellant to indicate his acceptance or declination of the offer by August 2, 1996. *Id.* The appellant made no response. The agency interpreted the appellant's silence regarding the offer as of the date specified for a response as a declination, and by letter dated September 24, 1996, notified the appellant that he would be separated by operation of RIF procedures, effective September 29, 1996. *Id.*

¶3 On September 25, 1996, the appellant filed a complaint with the Office of Special Counsel (OSC), alleging that the agency separated him by RIF in retaliation for his disclosure of alleged nepotism. *See* IAF, Tab 1. OSC investigated the appellant's allegations, but did not seek corrective action. *Id.* At the conclusion of the proceedings before OSC, it notified the appellant of his right to file a whistleblower appeal with the Board, and the appellant did so. *Id.* During the processing of the whistleblower appeal, the parties entered into a settlement agreement. *See* IAF, Tab 12. The agreement provided that the "[a]ppellant hereby withdraws his Individual Right of Action appeal before the Board, with prejudice" and "understands that he may not refile or relitigate the issues raised in his appeal pertaining to whistleblowing" IAF, Tab 12. On October 31, 1997, the administrative judge entered the settlement agreement into the record for enforcement purposes, and dismissed the appeal. *See* IAF, Tab 13.

¶4 On November 7, 1997, the appellant filed a submission with the regional office regarding the merits of the RIF separation. *See* RIF Initial Appeal File (RIAF), Tab 1. The regional office docketed the submission as a petition for appeal, *Weslowski v. Department of the Army*, MSPB Docket No. PH-0351-98-0070-I-1. *Id.* The agency filed a motion to dismiss. *See* RIAF, Tab 3. The agency asserted that this appeal concerned subject matter identical to that of the appeal from OSC's termination of its investigation into the appellant's complaint of whistleblower reprisal, and that the settlement of that appeal precluded this one. *Id.* The agency also asserted that the Board lacked jurisdiction because RIF appeals were not excluded from the coverage of the collective bargaining agreement (CBA) applicable to the appellant. *Id.* Finally, the agency asserted that the appeal was untimely. *Id.*

¶5 The administrative judge ordered the appellant to file evidence and argument to show that the Board had jurisdiction over the appeal, or to show good cause for his more than one-year delay in filing. *See* RIAF, Tab 6. The appellant responded, stating that he was not a member of the union, that he has medical conditions, depression and deficit hyperactivity disorder, and that, when he filed his whistleblower complaint, OSC told him that he could file with the Board at the conclusion of OSC's investigation. *See* RIAF, Tab 7. The administrative judge found that the agency informed the appellant of the time limit for filing with the Board, and that the appellant did not show that his medical conditions prevented him from timely filing his appeal. *See* RIAF, Tab 9 (Initial Decision (ID) at 3). He dismissed the appeal as untimely filed, without making a finding on the issue of jurisdiction. *Id.* (ID at 4).

¶6 The appellant has petitioned for review. *See* Petition for Review File (RF), Tab 1. In his petition, the appellant addresses issues involved in both the initial decision in MSPB Docket No. PH-1221-97-0377-W-1, that dismissed his whistleblower appeal as settled, and the initial decision in MSPB Docket No.

PH-0351-98-0070-I-1, that dismissed his appeal of the merits of his RIF separation as untimely filed. Thus, we have considered the appellant's petition as a petition for review of both initial decisions.

ANALYSIS

The appellant's appeal of the merits of his separation by RIF procedures was not precluded by the settlement agreement in his whistleblower appeal.

¶7 A settlement agreement is a contract, and the interpretation of its terms is a question of contract law. *Greco v. Department of the Army*, 852 F.2d 558, 560 (Fed.Cir.1988). In construing the terms of a settlement agreement, the words of the agreement are of primary importance in determining the parties' intent at the time they entered into the agreement. *Kelley v. Department of the Air Force*, 50 M.S.P.R. 635, 641 (1991). The Board will not imply a term into an agreement that is unambiguous. *Id.*

¶8 Here, the terms of the settlement agreement in the whistleblower appeal are unambiguous. As noted above, the agreement provided that the "[a]ppellant hereby withdraws his Individual Right of Action appeal before the Board, with prejudice" and "understands that he may not refile or relitigate the issues raised in his appeal pertaining to whistleblowing" IAF, Tab 12. The settlement agreement therefore did not resolve any issues pertinent to the merits of the appellant's RIF separation. These issues, in effect, were left to be resolved separate from the settlement agreement, if there was a forum available to the appellant for them. Thus, the administrative judge correctly dismissed the whistleblower appeal under the terms of the settlement agreement, notwithstanding that the agreement on its face resolved only the issue of whether the appellant's RIF separation was effected in retaliation for whistleblowing.

The Board does not have jurisdiction over the merits of the appellant's RIF appeal.

¶9 Initially, in his appeal of the merits of his separation by RIF procedures, the appellant stated that he was not a member of the union, and reiterated his request that the Board adjudicate the merits of his RIF separation. If an employee is covered by a CBA, matters that customarily would be within the appellate jurisdiction of the Board are deemed to be covered by the negotiated grievance procedure, and thus beyond the Board's jurisdiction, unless a matter is excluded from the application of the grievance procedure. *See Di Sera v. Department of the Army*, 71 M.S.P.R. 120, 122 (1996). However, an aggrieved employee affected by a prohibited personnel practice under 5 U.S.C. § 2302(b)(1), i.e., discrimination on the bases of race, color, national origin, sex, religion, disability, age, equal pay, marital status, and political affiliation, which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure, i.e., a Board appeal, the EEO complaint process, or the negotiated grievance procedure. 5 U.S.C. § 7121(d). The employee shall be deemed to have exercised his option to raise an allegation of discrimination with the Board, in the EEO complaint process, or under the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, whichever occurs first. *Id.*

¶10 Here, the applicable CBA does not exclude demotions and separations taken pursuant to a RIF from the negotiated grievance procedure. *See* RIAF, Tab 8, Subtab 2. Therefore, notwithstanding that the appellant is not a member of the union, the negotiated grievance procedure is the exclusive appellate avenue for employees separated by operation of RIF procedures and covered by the CBA, except for those who allege discrimination prohibited under section 2302(b)(1). 5 U.S.C. § 7121(d). There is no evidence of record that the appellant alleged such discrimination when he filed his complaint with OSC, when he filed his appeal with the Board from the conclusion of OSC's investigation of his whistleblower reprisal complaint, or when he filed this appeal of the merits of the RIF action.

¶11 For the first time in this petition for review, the appellant states that he will file an equal employment opportunity (EEO) complaint against the agency and OSC for violating the Americans with Disabilities Act (ADA) by not accommodating his disabling conditions of depression and attention deficit disorder. We construe this statement on petition for review as an assertion by the appellant that the Board has jurisdiction over the merits of his RIF separation under 5 U.S.C. § 7121(d), i.e., that the Board's jurisdiction is predicated on the appellant's assertion that his RIF separation was discriminatory on the basis of disability. *See Walters v. U.S. Postal Service*, 65 M.S.P.R. 115, 119 (1994).

¶12 An appellant may raise an allegation of discrimination at any time during the Board's consideration of the appeal of the agency's action, including on petition for review, if the appellant did not know of the existence of a basis for the allegation at the time that the petition for appeal was filed. *See Anderson v. Veterans Administration*, 3 M.S.P.R. 71, 74 (1980). *See also Schermerhorn v. United States Postal Service*, EEOC Request No. 05940729 (Feb. 10, 1995) (the time limit to begin the EEO complaint process is not triggered until a complainant should have reasonably suspected discrimination). The appellant explains that he is raising his allegation of disability discrimination eighteen months after the agency effected his separation because he "recently discovered" that "[b]oth Depression and Attention Deficit Disorder are recognized by [the Equal Employment Opportunity Commission] as being in the scope of the [ADA]."

¶13 An appellant must raise a discrimination claim when he has sufficient knowledge of facts and circumstances to form a reasonable suspicion that prohibited discrimination has occurred. *See Ball v. U.S. Postal Service*, EEOC Request No. 05880247 (July 6, 1988). An appellant's responsibility to raise the issue of discrimination is triggered when he possessed sufficient facts that he should have reasonably suspected discrimination, but before all of the facts that would have supported a charge of discrimination have become apparent. *Id.*

Here, the appellant admits that he had been treated for depression and attention deficit disorder for many years, and alleges that the Health Clinic and his place of employment had this information in his personnel file. *See* RF, Tab 1. He also was aware that the agency had not accommodated his conditions. Further, he was fully aware of the facts around his separation by September 29, 1996, the effective date of the agency's separation action. *See* IAF, Tab 5; RIAF, Tab 8. Thus, he had sufficient information to reasonably suspect that his RIF separation might be discriminatory on the basis of disability.

¶14 He alleges on petition for review, however, that he did not know he could file an EEO complaint based on his conditions because he was unaware that they were within the scope of the ADA. However, the additional information that the appellant discovered after he had filed his petition for appeal was not information that could reveal a discriminatory motive on the part of the agency. Therefore, we find that this additional information is not a basis for waiving the time limit for raising a claim of discrimination on the basis of disability, and consequently the appellant's allegations of disability discrimination on petition for review do not provide a basis for the Board's jurisdiction over his appeal from the conclusion of the merits of his RIF separation.¹ Accordingly, we dismiss this appeal for lack of Board jurisdiction.²

¹ Because the Board lacks jurisdiction over the appellant's appeal of the merits of his RIF separation under 5 U.S.C. § 7121(d), we need not address whether the appellant's filing with OSC before filing with the Board constituted an election under 5 U.S.C. § 7121(g) that precluded Board jurisdiction over the merits of the appellant's separation by RIF procedures. .

² Jurisdiction is the threshold issue in adjudicating an appeal. *See Popham v. U.S. Postal Service*, 50 M.S.P.R. 193, 197 (1991). Because we find that the Board does not have jurisdiction over this appeal, we need not reach the issue of whether the appellant timely filed his appeal of the merits of his RIF separation. *See Clark v. Army and Air Force Exchange Service*, 57 M.S.P.R. 43, 46 n.3 (1993). Accordingly, we also do not reach the issue of whether the initial decision dismissing the appellant's appeal as untimely filed is consistent with the standard recently announced in *Lacy v. Department of the Navy*, 78 M.S.P.R. 434, 437-38 (1998).

ORDER

¶15 This is the final order of the Merit Systems Protection Board in this appeal.
5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING
FURTHER REVIEW RIGHTS

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling

condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

- ¶1 The court must receive your request for review no later than 60 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.